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No. 99-1329

Supreme Court, U.S.
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In The

Supreme Court of the United States

THELMA VIRGINIA GRAYSON, Administrator of the Estate of Gerald Anthony Collins,

Petitioner,

v.

M. E. ROYER,

Respondent.

On Petition For A Writ Of Certiorari To The U.S. Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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RESTATEMENT OF QUESTION PRESENTED

WHETHER THE FOURTH CIRCUIT CORRECTLY HELD THAT ROYER WAS NOT DELIBERATELY INDIFFERENT TO ANY SERIOUS MEDICAL NEED OF GERALD ANTHONY COLLINS WHEN COLLINS DID NOT EXHIBIT ANY SIGN OR SYMPTOM OF ANY SERIOUS MEDICAL CONDITION OR ASK FOR ANY MEDICAL ASSISTANCE AT ANY TIME WHILE COLLINS WAS IN ROYER'S CUSTODY, WHEN IN FACT COLLINS DID NOT HAVE A SERIOUS MEDICAL CONDITION UNTIL OVER EIGHT HOURS AFTER THE ADULT DETENTION CENTER HAD ASSUMED COLLINS' CUSTODY FROM ROYER, WHEN ROYER KNEW THAT THE ADC HAD PARAMEDICAL PERSONNEL ON DUTY AROUND THE CLOCK AND SCREENED INCOMING INMATES FOR SERIOUS MEDICAL CONDITIONS, AND WHEN ROYER HAD ADVISED THE ADC UPON COLLINS' ADMISSION THAT COLLINS WAS PROBABLY UNDER THE INFLUENCE OF PCP?

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The respondent, Mark E. Royer ("Royer"), by counsel, respectfully represents that the judgment of the U.S. Court of Appeals for the Fourth Circuit ("Fourth Circuit") is plainly correct and, therefore, the Court should deny the petition for a writ of certiorari of the petitioner, Thelma Virginia Grayson ("Grayson").

RESTATEMENT OF JURISDICTION

This Court has jurisdiction to consider the Petition for a Writ of Certiorari under 28 U.S.C. § 1254(1).

RESTATEMENT OF THE CASE

This case arises from the arrest of the decedent of the petitioner, Gerald Anthony Collins ("Collins"), for possession of marijuana and phencyclidine (PCP) by Royer, a Fairfax County (Virginia) Police Officer, at approximately 7:00 p.m., on Saturday, March 25, 1995, and Collins' subsequent incarceration at the Fairfax County Adult Detention Center ("ADC") on the evening of March 25, 1995, and on the morning of Sunday, March 26, 1995. At approximately 6:00 a.m. on the morning of March 26, 1995, sheriff's deputies found Collins was not breathing in his cell at the ADC.[1] Despite the fact that the deputies

[1] In Virginia, the Sheriff, who is an independent constitutional officer under state law, is the jailer. Carl Peed

immediately began cardiopulmonary resuscitation (CPR) and had Collins promptly transported to Fairfax Hospital, Collins died on March 27, 1995, after termination of life support.

Because Grayson's Statement of the Case, in particular, The Underlying Events, Petition at 3-9, does not fairly and accurately summarize the record before the Fourth Circuit and, in particular, omits material facts not genuinely in dispute in favor of Royer, Royer sets forth this Restatement of Facts.[2] Rule 15.2 of the Rules of the United States Supreme Court.

A. The Underlying Events

On March 25, 1995, Royer was working an approved secondary off-duty law enforcement job at an arcade in Tysons I mall in Fairfax County, Virginia. Royer was in uniform and had a police department portable radio on

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("Peed"), then the Sheriff of Fairfax County and the City of Fairfax, was in charge of the ADC. Grayson named Peed as one of the defendants. The Fairfax County Police Department is a non-*sui juris* department of the government of Fairfax County, Virginia. Grayson also named the County's Board of Supervisors ("County") as a defendant. Although the District Court granted, and the Court of Appeals affirmed, summary judgment in favor of the County and Peed, as well as in favor of Royer, Grayson only seeks a writ of *certiorari* with respect to the judgment in favor of Royer.

[2] In her Proceedings Below, Petition at 8-9, Grayson also does not fairly present the basis for the Court of Appeals' judgment. This will be addressed under the Reasons for Denying the Petition, *infra*. The Fourth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291.

his person and a police cruiser at the mall. At approximately 7:00 p.m., the Public Safety Communications Center ("PSCC") dispatched Royer to a possible mental disturbance case in the men's room in the Hecht's store in the mall.

On his arrival, Royer observed Collins lying on his back on the floor of the men's room. There were two Hecht's security guards, Tom Peltier and Jason Moses, in the bathroom with Collins. Collins was shouting, "I love everyone." Royer attempted to talk to Collins. However, Collins' only reaction was to stare at Royer, and then he started chanting what Royer knew from his experiences in the Marine Corps to be some kind of "Islamic phrases."

For his own and Collins' safety, Royer decided to handcuff Collins. Collins resisted being handcuffed, and it took Royer and both security guards to handcuff him. During the struggle, Collins grabbed hold of Royer's portable radio, which was on his belt, and keyed the microphone several times. The PSCC and other officers heard the sounds of the struggle over the radio. Even after being handcuffed, Collins continued to struggle and kick his legs. Royer applied pressure to Collins' legs to control them. About that time, Officers Cole, Pappas, and Wahrhaftig arrived on the scene. When the other officers arrived, Collins' ankles were secured by flexicuffs. Royer secured Collins' ankles to the handcuffs around his wrists by a second set of handcuffs and another set of flexicuffs and placed him on his side.

After the struggle, Collins did not show any signs that he had been injured in any way in the struggle. He was not bleeding. Collins did not show any signs of

having any difficulty breathing before, during, or after the struggle. Collins did not cry out in pain, he did not make any complaint of pain or injury, and he did not request medical assistance.

Collins had a black backpack with him. Royer searched the backpack and found two plastic 35 mm film canisters. One canister contained what Royer knew to be marijuana, based upon his training and experience. The other canister contained parsley that had a strong smell of ether. Royer was not sure what the material was and showed the canister to Wahrhaftig, a more experienced officer. Wahrhaftig told Royer that the parsley smelling of ether was PCP. Based upon his observations of Collins' strange behavior, the violence of his resistance, and his conclusions as to the contents of the two film canisters, Royer decided to arrest Collins for possession of marijuana, a misdemeanor, and possession of PCP, a felony.

Two on-duty supervisors, Sergeants John Vincent Byrd and Greg Smith, also came on the scene. Royer reviewed what had happened, and advised Byrd he intended to charge Collins with possession of marijuana and PCP. Byrd concurred. Byrd also checked Collins. He did not find any signs of injury or any sign that Collins was having any difficulty breathing.[3]

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[3] In his pre-trial deposition, Byrd explained that his use of the word "overdose" simply meant that Collins had ingested an illegal drug and expressly rejected the implication that his use of the word in that sense implied that Collins was exhibiting any signs or symptoms of a serious medical problem. Dr. Abbot, the ADC physician, in his deposition similarly described any ingestion of PCP as an "overdose" because by definition there was no medically appropriate dose for PCP.

Collins was then transported in a police wagon to the ADC in Fairfax, where there was a magistrate on duty. Two officers carried Collins to the wagon and placed him on his side in the wagon. Officer Wilder drove the wagon to the ADC. Royer drove himself to the ADC in his cruiser.

The ADC was notified by radio through the PSCC that Collins was being brought in and that he was possibly under the influence of PCP. PSCC also requested that deputies at the ADC assist in bringing Collins into the ADC. Upon Collins' arrival at the ADC, Master Deputy Sheriff ("MDS") Layne, MDS Gillette, Deputy Sheriff ("DS") DePoto, and DS Wright met the wagon at the sally port. Layne cut the flexicuffs securing Collins' ankles and connecting them to the handcuffs on his wrists, and Collins walked into the ADC without assistance. Wright secured Collins by a set of handcuffs to a bar near the magistrate's window to await Royer's arrival. According to the deputies, Collins was not bleeding, having any difficulty breathing, or exhibiting any other sign or symptom of a medical problem. He did not ask for medical assistance, and he did not complain of having any medical problem.

Royer arrived at the Magistrate's Office a few minutes after Collins. Royer spoke to Collins in the waiting area. At this time, Collins appeared normal. Collins confirmed that he had taken PCP. In response to Royer's questions, Collins provided his name, address, telephone number, age, date of birth, and other identifying information. Collins was not bleeding, having any difficulty breathing, or exhibiting any other sign or symptom of a medical problem. He did not ask for medical assistance,

and he did not complain of having any medical problem. Royer advised the deputies that he had to use force to arrest Collins and that they should use caution because Collins was unpredictable and under the influence of PCP.

The magistrate issued arrest warrants charging Collins with possession of marijuana and possession of PCP, set bond, and committed him to jail. Royer served the warrants on Collins at approximately 8:36 p.m.

After the warrants had been served, DS Bennett booked Collins into the ADC. As part of the booking process, Bennett completed a medical screening form. Because Collins appeared to be under the influence, in accordance with Sheriff's Department procedures, DS Corporal Laborde, a correctional health assistant, evaluated Collins during the booking process.

Laborde had been employed as a correctional health assistant in the ADC since October 15, 1992, following his honorable discharge from the U.S. Army as a Sergeant, where he served for over 13 years, as a medical specialist, a pharmacy specialist, and as a practical nurse. He not only held the Army's Expert Field Medical Badge, he was certified as an instructor for that rating. Laborde's medical training in the Army included training about drug reactions, including PCP, and actual service in emergency rooms, where he had dealt with patients under the influence of PCP. Dr. Jack Daniel, one of Peed's experts, a forensic pathologist and a former Army Medical Corps Lieutenant Colonel, was familiar with army medical training. He opined that Laborde was well qualified to assess Collins' condition upon admission to the ADC.

Laborde was called to the booking area around 9:00 p.m., and he observed and listened to the exchange between Collins and Bennett. Laborde believed Collins to be on some type of a drug. However, Collins was answering Bennett's questions appropriately. Collins answered "no" to most of the questions on the screening form and was angry about being in jail. On average, Laborde observes 15 prisoners a day being booked. In his experience, it is not unusual for an inmate to be "unhappy" and "angry" while they are being booked into jail.

Based upon his observations, Laborde did not believe that there was any reason not to admit Collins into the ADC. According to Laborde, had he observed anything that he thought would have indicated that Collins should have been refused admittance into the ADC, he would have told Bennett.

The Sheriff's Department's procedures require that whenever a person is admitted to the ADC on weapons or drug charges, he or she is strip-searched. The arresting police officer remains while the deputies conduct the search so that he or she can take immediate possession of any evidence or contraband discovered during the search.

The deputies took Collins to an isolation cell, S-2, to conduct the search. Layne and Gillette conducted the search while DePoto and Wright held Collins. During the search, Royer remained in the corridor outside of the cell. When the search was over, Collins was told to remain on the floor while the deputies left the cell. As Wright and DePoto were leaving the cell, Collins all of a sudden yelled, "I'm not staying here," and lunged toward the door on all fours. Collins grabbed hold of the door and

the doorjamb while DePoto and Gillette attempted, without success, to close the door. Collins got his head and shoulders out of the cell and continued to pull himself out of the cell. Throughout the incident, Collins ignored the deputies' verbal commands to go back into his cell. Layne struck Collins' shoulder three times with his foot, and Wright struck Collins' fingers with his foot in an unsuccessful effort to get Collins to release his grip. Wright sprayed Collins twice with pepper spray, without apparent effect. Collins continued to pull himself out of the cell. Royer then sprayed Collins with his pepper spray. Collins reacted by shaking his head and blinking his eyes and going onto all fours. Royer ceased spraying, and the deputies were able to push Collins back into the cell.

Deputy Sheriff Lieutenant Carroll, the on-duty shift supervisor, called for a medic to evaluate Collins and decontaminate him as necessary. Laborde came to cell S-2, with sterile water and gauze, observed Collins, and attempted to talk to him through the cell window. Laborde identified himself as a medic and told him he needed to clean his eyes and asked him if he would allow him to do so. However, Collins refused and became verbally abusive. Based upon his observations of Collins' behavior, Laborde determined that Collins was not suffering from the effects of the pepper spray.

The incident with Collins at approximately 9:10 p.m. on March 25, 1995, was Royer's last contact with Collins.

The deputies observed Collins at 15-minute intervals during the night. He was given water at 11:00 p.m. and 1:00 a.m. He was given his clothing back at 12:30 a.m.

Laborde checked on Collins shortly after midnight and again around 3:00 a.m. Laborde again tried to talk to Collins by use of the intercom, but Collins was still angry and would not cooperate. S-2 was one of several cells used for isolating agitated prisoners, and Collins was placed there for his own protection.

At approximately 5:30 the next morning, March 26, 1995, while the deputies were attempting to give Collins breakfast, Collins put his hand and arm in the food slot on the cell door and out into the corridor. Despite verbal commands from the deputies, Collins refused to take his hand out of the food slot and after attempts to convince him to do so had failed, the cell door was opened slightly in an attempt to distract Collins.

Instead, Collins managed to get his foot wedged in the doorway and refused to remove it despite the efforts of several deputies. Despite the use of pepper spray, Collins continued to inch his way out of the cell. Carroll ordered several deputies to put on protective gear and to enter the cell to control Collins. They succeeded in controlling Collins and then moved him temporarily to the adjoining cell, S-1. Collins continued to be aggressive in S-1, and Carroll then decided that Collins should be restrained in 4-point restraints in cell R-32 and he was again moved. Collins was conscious and resisting during the move from S-1 to R-32.

After Collins had been restrained in R-32, Laborde and another medic examined Collins. Both medics determined that Collins was in no distress. However, shortly thereafter, a deputy found that Collins was unresponsive. The deputies immediately commenced CPR and called

911. Collins was rushed to Fairfax Hospital by ambulance. However, he died on March 27, 1995 at 12:30 a.m.

Based upon his training and experience as a Fairfax County police officer, Royer knew that the ADC had trained paramedical personnel on duty 24 hours a day, that prisoners were medically screened prior to admission to the ADC, and that the deputies at the ADC would refuse to accept prisoners with medical problems without medical clearance.[4]

Contrary to the impression given by Grayson's Statement of the Case, Petition at 7, Dr. Field's autopsy report was not the only medical evidence before the Fourth Circuit and the District Court.

According to Grayson's own expert, Michael M. Baden, M.D., a forensic pathologist, the levels of PCP found in Collins' liver and blood on autopsy were too low to be a cause of death, and he specifically rejected the idea that PCP was the cause of death. Instead, Dr. Baden's theory as to cause of death was that at some point while the deputies were carrying Collins from S-1 to R-32, Collins was asphyxiated accidentally. Dr. Baden also agreed that at the time Laborde observed Collins during the booking process, there was no problem. Dr. Baden did state that he thought a "mental health professional" should have evaluated Collins, although he was not clear

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[4] As part of his training at the police academy, Royer spent a day in the ADC observing the operations of each of the different stations in the ADC.

what a mental health professional would have done beyond talking to Collins.[5]

Dr. David Abbot, the ADC physician from 1978 to 1996 who had extensive experience with inmates under the influence of drugs, opined without contradiction that PCP requires time to leave the body, that there are no drugs that can be used to treat persons under the influence of PCP, that PCP, unlike some drugs, such as alcohol or heroin, does not have a withdrawal syndrome presenting medical problems, and that the inmate requires restraints away from other prisoners. There was no evidence in the record that PCP ingestion always creates a substantial risk of a serious medical condition or that it does so in a significant percentage of cases.

Dr. Jack Daniel opined, again without contradiction, that Collins did not exhibit any sign or symptom of any serious medical condition until he had been found unresponsive on the morning of March 26, 1995.

REASONS FOR DENYING THE PETITION

The Fourth Circuit correctly found that Royer had not been deliberately indifferent. At no time while Collins was in Royer's custody did Collins exhibit any sign or report any symptom of a serious and immediate medical

[5] Although, as discovery in the lawsuit uncovered, Collins did have a history of substance abuse, there was no evidence that Collins ever had a history of mental health problems. In any event, Collins was not in the mood for a quiet consultation on the evening of March 25, 1995.

problem. In fact, Collins did not show any sign or symptom of any serious medical condition at all until approximately 6:00 a.m. the next morning, more than eight hours after Royer had passed custody of Collins to the ADC and his last contact with him.

Review on a writ of *certiorari* is not a matter of right, but of judicial discretion, and a petition will be granted only for compelling reasons. Rule 10 of the Rules of the Supreme Court. Grayson argues that the Fourth Circuit's decision in this case conflicts with this Court's decision in *Estelle v. Gamble*, 429 U.S. 97 (1976), and the decision of the Court of Appeals for the Tenth Circuit ("Tenth Circuit") in *Garcia v. Salt Lake Co.*, 768 F.2d 303 (10th Cir. 1985). Petition at 9-11; *see* Rule 10(a) of the Rules of the Supreme Court. She further argues that the Fourth Circuit had created a distinction between known external injuries and internal injuries suffered by a pretrial detainee and that this distinction had created an "important question of federal law" that this Court should review. Petition at 11-12; *see* Rule 10(c) of the Rules of the Supreme Court.

Neither argument survives reading what the Fourth Circuit actually said in its decision, what this Court said in *Estelle*, or what the Tenth Circuit said in *Garcia*. Both arguments are refuted by what the Fourth Circuit actually said as opposed to Grayson's highly selective quotation from the opinion.

Grayson never articulates how the standard stated by the Fourth Circuit conflicts with the standard set forth in *Estelle* because she cannot. Instead, she argues that the Fourth Circuit's decision is in conflict with *Garcia*, which also applied the *Estelle* standard. The Fourth Circuit held

that "to establish a claim of deliberate indifference to medical need, the need must be both apparent and serious, and the denial of attention must be both deliberate and without legitimate penological objective," *Grayson v. Peed*, 195 F.3d 692, 695 (4th Cir. 1999), App. to Pet. at 5a (*citing Martin v. Gentile*, 849 F.2d 863, 870-71 (4th Cir. 1988). The court noted that deliberate indifference is a very high standard and that a showing of mere negligence will not meet it. *Id.* at 695, App. to Pet. at 6a (*citing Estelle*, 429 U.S. 104-106; *Whitley v. Albers*, 475 U.S. 312, 319 (1986) and *Farmer v. Brennan*, 511 U.S. 825, 835-36 (1994)).

The Fourth Circuit found first of all that:

> [T]here was no objective evidence available to Officer Royer at the time of the incident that Collins had a serious need for medical care.

Grayson, id. at 695, App. to Pet. at 5a.

The Court further noted that:

> For at the time of their encounter, Collins exhibited to Royer no visible external injuries. *He did not have trouble breathing. He was not bleeding, was not vomiting or choking, and was not having a seizure. Furthermore, Collins was conscious, at least somewhat responsive, and able to answer questions.*
>
> Collins did have an enlarged heart and had previously been diagnosed with congestive heart failure. But the only person on the scene who knew this information was Collins himself. Collins did not inform Officer Royer or any other officer involved of this prior medical history. The law cannot demand that officers be mind readers. *The medical circumstances that lead*

> *to Collins' death did not even manifest themselves until the following morning, more than ten hours after Officer Royer decided to take Collins to the ADC rather than to a hospital.*
>
> Moreover, Officer *Royer could reasonably conclude that taking Collins to the ADC would not prevent him from receiving needed medical attention.* The ADC had trained medical personnel on duty 24 hours a day. On the evening in question, Jose Laborde, an army-trained practical nurse and a Virginia licensed correctional health assistant, was on duty. Further, Officer *Royer alerted the ADC staff of Collins' possible PCP intoxication.* Royer was, therefore, in no sense, deliberately indifferent to Collins' medical needs.

Id. at 695; App. to Pet. at 6a. (underlined portions quoted by Grayson in Petition; italics, emphasis added).

Grayson's reliance on *Garcia* is misplaced to say the least. First, there is a significant factual difference between these two cases. In *Garcia*, unlike this case, the decedent had an obvious and apparent serious medical condition – he was unconscious. Second, *Garcia* did not even address the issue presented here: whether an arresting police officer was deliberately indifferent to the serious medical needs of an arrestee. The issue before the Tenth Circuit in *Garcia* was Salt Lake City's contention that it should not be held liable for deliberate indifference to serious medical needs when the jury had returned verdicts in favor of all of the individual defendants on the same claim. The verdicts in favor of the individual defendants were not challenged on appeal. In fact, it is not even clear from the opinion in *Garcia* that the arresting officer or officers had even been named as defendants.

The Fourth Circuit's decision in this case is not in conflict with either *Estelle* or *Garcia*.

Grayson's second argument is also refuted by what the Fourth Circuit actually said as opposed to the isolated words and phrases quoted by her out of context. The Fourth Circuit did not create any dichotomy between internal or external injuries or any new standard for evaluating claims of deliberate indifference to serious medical needs. It based its decision on the signs and symptoms, more specifically, the lack thereof, that could have been observed by a police officer and the conclusions that he or she would draw from them.

Finally, it should be noted that Royer also had raised the defense of qualified immunity. Neither Court below reached this issue because both had found there was no constitutional violation. Based upon the facts known to Royer, interpreted in light of his training and experience, a reasonable police officer in his position could reasonably believe that by taking the steps which Royer took, he was not being deliberately indifferent to a serious medical need of Collins. As a result, even if there had been a constitutional violation, Royer would be entitled to qualified immunity. *See Gooden v. Howard County*, 954 F.2d 960, 967-968 (4th Cir. 1992) (*en banc*); *see also Harris v. District of Columbia*, 932 F.2d 10 (D.C. Cir. 1991).

CONCLUSION

As noted by the Fourth Circuit, Collins' death was a sad occurrence. However, Royer was not deliberately indifferent to a serious medical need of Collins. The decision of the Fourth Circuit is consistent with the decisions of this Court and is not in conflict with the decisions of other courts of appeal. This case does not present any significant federal question. For the foregoing reasons, the Court should deny Grayson's petition for a writ of *certiorari*.

Respectfully submitted,

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